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No. 84-1586

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

EDWARD MALLEY AND THE STATE OF RHODE ISLAND,
Petitioners,

v.

JAMES R. BRIGGS AND LOUISA BRIGGS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a police officer who charges a person with the commission of a crime and who requests that a judge issue a warrant for the arrest of that person, all under facts which provide no reasonable grounds for concluding that probable cause exists, is nevertheless immunized from liability under 42 U.S.C. § 1983 if the judge issues the requested warrant.

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BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondents James Briggs and Louisa Briggs are husband and wife. They are long-time residents of the Town of Narragansett, Rhode Island, having lived there for over thirty years. (J.A. 12, 30). They are prominent and substantial members of the community, well-known and active in civic affairs. Mr. Briggs is a real estate developer and served eight years as the elected tax assessor of Narragansett. He has been active in community affairs as well, having served as the chairman for the heart fund and muscular dystrophy drives and as the president of the Narragansett Chamber of Commerce. (J.A. 13-14). He is also a director and officer of a local bank, the

Pettaquamscutt Credit Union. (R. 3). Both Mr. and Mrs. Briggs enjoyed an excellent reputation in the community (R. 69-71, 137-38) and neither has ever had any involvement with illegal drugs. (R. 30, 54).

On December 20, 1980, Rhole Island State Police intercepted a telephone call on a court-authorized wiretap in connection with a narcotics investigation of one Paul Driscoll, who was a friend of respondents' daughter. (J.A. 39, 44). The call was overheard by Joseph Miranda of the Rhode Island State Police, who noted the substance of the conversation on a call log sheet. (J.A. 78). The call was spot-monitored, that is, the officer intercepting the call turned the recorder off then on again to eliminate recording what he deemed to be general conversation. (J.A. 55-56). The call log sheet states that the caller identified himself as "Dr. Shogun" and that there was a general conversation about a party the preceding night. In the words of officer Miranda, "caller says I can't believe I was token [sic] in front of Jimmy Briggs—caller states he passed it to Louisa—caller and Paul talk about another party going down tonight—Paul says Nancy was sitting in his lap rolling her thing . . ." Officer Miranda noted that the call was non-incriminating. (J.A. 57).

The investigation of Paul Driscoll was being directed by petitioner Edward Malley. Malley was not present when the call from "Dr. Shogun" was intercepted, but discussed the call shortly after with detective Ronald Youngsma, who was working with Malley on the investigation. They determined that the call was in fact an incriminating call because "token" is drug parlance for smoking marijuana and because the phrase "rolling her thing" meant rolling a mari-

juana cigarette. (J.A. 57-58). Solely on the basis of the conversation of December 20, 1980, Malley concluded that James and Louisa Briggs had committed the crime of conspiracy to possess marijuana with intent to deliver. (J.A. 59-60). At this time Malley knew or should have known of the respondents' excellent reputation in the community. Besides the fact that Narragansett is a small town, Detective Captain James Cooke of the Narragansett Police Department, who assisted the Rhode Island State Police in arresting Mr. and Mrs. Briggs (R. 5), testified that he had known them personally for twenty-five years and that they are "outstanding citizens of the town." (R. 60-61).

After forming his conclusions that Mr. and Mrs. Briggs were involved in criminal activity, Malley then prepared an Affidavit and Arrest Warrant form and a District Court Felony Complaint form for Mr. and Mrs. Briggs. The printed form of the Affidavit and Arrest Warrant for James Briggs stated that "Your affiant upon oath states that he has reason to believe and does believe that grounds for issuance of an arrest warrant exists and states the following facts on which such belief is founded." (J.A. 72). Malley then typed an affidavit in which he described the substance of the December 20 call as recorded by officer Miranda and his understanding of the meaning of the drug terminology used. He concluded the affidavit with the statement, "Therefore, your affiant requests that an arrest warrant be issued for James R. Briggs, alias John Doe . . ." (J.A. 73). A similar form was completed for Louisa Briggs. (J.A. 75-76). Malley signed each form as "affiant."

The District Court Felony Complaint forms listed the Rhode Island State Police as "complainant." The printed portion of the form stated, ". . . The here named complainant on oath, in the name and behalf of the State, says that the here named defendant . . . on the date with force and arms acted in violation of law and wherefore the complainant prays that a summons or arrest warrant may issue . . ." Malley then typed in the specific charges against Mr. and Mrs. Briggs and signed the complaint as "authorized officer." (J.A. 74, 77). After preparing the affidavits and court forms, Malley appeared before a judge of the Rhode Island District Court on February 25, 1981, who issued arrest warrants for Mr. and Mrs. Briggs, as well as twenty other individuals. (R. Plaintiffs' Exhibit 3).

Respondents were awakened from their sleep and arrested in their home in the early morning hours of March 19, 1981. They were transported by police car to a State Police barracks, where they were fingerprinted and held in a garage with other arrestees from about 7:00 A.M. to about 2:00 P.M. During this time, mug shots were taken of respondents, both individually and together with other arrestees. (R. 6-9); R. 39-43). At midafternoon, Mr. and Mrs. Briggs were taken by bus to court for arraignment. They were filmed and photographed by the news media as they left the barracks to board the bus and again when they entered the courthouse. (R. 43-45).

In addition to these indignities, Mr. Briggs was further humiliated when the president of the credit union on whose board of directors he had served for twenty-five years asked him to take a leave of absence from the board until the criminal charges were cleared

up. (R. 26-28). This president testified that respondents' arrests were "the talk of the town" and that half of the people who came in to the credit union office asked him about the arrests. (R. 139-140).

The grand jury which considered the charges against Mr. and Mrs. Briggs returned no true bill. (J.A. 4, 10).

Respondents concur with petitioner's statement of the procedural history of this case.

SUMMARY OF ARGUMENT

In determining whether and to what extent an immunity is available to a state official sued under 42 U.S.C. § 1983, this Court has been guided by reference to the common law as it existed at the time § 1983 was enacted. This analysis is premised on the recognition that the drafters of § 1983 were familiar with common law tort principles, including defenses, and intended that those defenses should apply to cases brought under § 1983. Since the statute by its broad terms subjects an entire class of persons to civil suit, only those functions that were immunized from suit under the common law of the late-nineteenth century could have been intended by Congress to be protected from suit under § 1983. In the absence of absolute immunity at common law for the official function at issue, this Court has refused to sanction an absolute immunity under § 1983, thereby declining to engage in the legislative policy-making that such a decision would require.

No immunity existed at common law for the routine police function of accusing persons of crime and procuring warrants for their arrest. Even with respect

to private complainants, the tort of malicious prosecution imposed liability on anyone who initiated criminal proceedings in bad faith and without probable cause when those proceedings terminated in favor of the accused. And the judicial issuance of a warrant, rather than exculpating the complainant from liability, commonly satisfied the first element of the tort's *prima facie* case, the institution of criminal proceedings. The complainant could escape liability by showing the existence of probable cause or the lack of malice, or by proving that he did not impel the proceedings in any way but simply brought the facts to a judicial officer without accusing the suspect or requesting that process be issued. The defenses were entirely factual, having no similarity to the absolute immunities which completely barred at the outset suits against judges, public prosecutors, or witness.

This Court has held, and repeatedly reaffirmed, that "[t]he common law has never granted police officers an absolute and unqualified immunity," *Pierson* v. *Ray,* 386 U.S. 547, 555 (1967), and the Circuit Courts of Appeals have uniformly followed this declaration by applying a qualified immunity to routine police functions in § 1983 actions. Any other rule would subvert the broad remedial and deterrent purposes of § 1983 by exempting an entire class from liability under § 1983 without any basis for concluding that Congress could have intended such a wholesale exemption.

Neither does the defense of prosecutorial immunity for activities "intimately associated with the judicial phase of the criminal process," *Imbler* v. *Pachtman,* 424 U.S. 429, 430 (1976) apply to the police function of accusing persons of crimes and procuring warrants

for their arrest. If this function is assumed to fall under the umbrella of prosecutorial immunity, then it is difficult to think of a police function governed by the Fourth Amendment which will not. For purposes of § 1983, the Fourth Amendment will have become a dead letter, a result that the Congress that enacted § 1983 could not have even considered, much less intended. Tort law recognizes the dissimilarity in functions between prosecutors and police by withholding from the latter the immunity from malicious prosecution suits enjoyed by the former. This Court should similarly reject petitioner's claim to prosecutorial immunity for his actions in accusing respondents of crime and swearing out warrants for their arrest.

A qualified immunity in this case properly balances the remedial and deterrent purposes of § 1983 against the need for effective law enforcement, and the Court of Appeals accurately applied the objective reasonableness qualified immunity standard of *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982). Under this standard, a police officer will be shielded by good faith immunity unless his actions were so flagrant that it can be said that no reasonable police officer would have acted in the same way. Liability will not be imposed on an officer simply because his actions are later found to be erroneous; only errors which are objectively unreasonable will be actionable. An immunity of this scope adequately protects both the police officer and the public by recognizing that an officer cannot function if every error, no matter how reasonable, brings a lawsuit, while at the same time acknowledging that a police officer who is unaccountable for his actions is ultimately above the law.

The *Harlow* standard may not be applied in so simplistic a fashion as to argue that the mere act of applying to a judge for a warrant conclusively establishes objective reasonableness. This is especially so when the arrest planned by the officer does not fall under any of the exceptions to the warrant requirement and the officer is therefore commanded by the Constitution to appear before a magistrate. This Court has recognized that a magistrate's issuance of a warrant does not necessarily establish the good faith of the police officer for purposes of determining whether an exception to the exclusionary rule applies, and so should rule that the mere act of appearing before a magistrate does not establish objectively reasonable conduct for qualified immunity purposes.

This Court should likewise reject any suggestion that the judicial issuance of the warrant severs the causal relationship between petitioner's unreasonable actions and the arrests of respondents. Petitioner directly caused respondents' arrests, and it is a novel theory of causation which would insulate him here. Even if his actions are somehow deemed to be removed from the harm, the causation language of § 1983 establishes a broader causation standard than might be applied in other contexts and clearly encompasses petitioner's acts and their consequences. Under § 1983, petitioner must be held accountable "for the natural consequences of his actions." *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961). The holding below properly imposes liability on him and gives respondents a remedy for the serious deprivation they suffered if the trier of fact finds that he acted in an objectively unreasonable way. This ruling should be affirmed.

ARGUMENT

I. Police Officers Are Not Entitled To An Absolute Immunity From Suit Under 42 U.S.C. § 1983 For Actions Taken To Charge Persons With Crime And Procure Warrants For Their Arrest.

The scope of an immunity available to a state actor under 42 U.S.C. § 1983 will be determined by this Court "[o]nly after careful inquiry into considerations of both history and policy . . ." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981). *See Imbler* v. *Pachtman*, 424 U.S. 409, 421 (1976). This Court will find an immunity applicable under § 1983 only when a review of the common law extant when § 1983 was enacted and the policy reasons for and against the claimed immunity show "that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980) (quoting *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967)). Thus, the absolute immunities which have been held to apply to judges, *Pierson* v. *Ray, supra*, legislators, *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), prosecutors, *Imbler* v. *Pachtman, supra*, and witnesses, *Briscoe* v. *LaHue*, 460 U.S. 325 (1983) have been premised on a strong common law tradition of immunity for those functions as well as compelling policy reasons for insulating those functions from liability under § 1983. No absolute immunity has been conferred by this Court on a state actor under § 1983 without a corresponding immunity for the function at common law.

As *Owen* v. *City of Independence* makes clear, the question of immunity under § 1983 is a question of

statutory construction which focuses on discerning whether the Congress that enacted § 1983 intended by the general language of the statute to negate an immunity available at that time under the common law. 445 U.S. at 637; *see also City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 258. This Court has generally held that Congress did not intend to abolish immunities which were firmly established at common law and has therefore construed § 1983 to incorporate such immunities when they are consistent with the purposes of § 1983. However, since the question is one of statutory construction and legislative intent, this Court has refused to impose its own notions of public policy on the statute by engrafting onto § 1983 immunities which have no historical basis and which Congress therefore could not have intended be applicable to § 1983. *Tower* v. *Glover*, 104 S.Ct. 2820, 2826 (1984).

The absolute immunity sought by petitioner has no common-law precursor. Neither is it justified by considerations of policy. Police officers have traditionally been accorded only a qualified immunity for transgressions committed during performance of their police duties and that is the only immunity to which petitioner here is entitled.

A. The Common Law Has Never Recognized An Absolute Immunity Protecting One Who Institutes Criminal Charges Or Procures An Arrest Or Search Warrant

In *Pierson* v. *Ray*, 386 U.S. at 555, this Court stated that "[t]he common law has never granted police officers an absolute and unqualified immunity . . ." Nevertheless, petitioner purports to find support in the common law for his proposition that

one who procured a warrant from a magistrate was immune from suit for the consequences of his act. Petitioner's support, however, is illusory; an action has always been maintainable at common law against one who wrongfully procures a warrant. *Pierson's* characterization of the common law is correct.

In *Wolf* v. *Colorado,* 338 U.S. 25 (1949), this Court catalogued the various remedies available at common law to redress invasions of the right of privacy by searches conducted pursuant to warrant. The Court noted that actions were permitted "against the searching officer. . . . against one who procures the issuance of a warrant maliciously and without probable cause, . . . against a magistrate who has acted without jurisdiction in issuing a warrant, . . . and against persons assisting in the execution of an illegal search . . ." *Id.* at 30 n. 1 In the cases cited by Justice Frankfurter in *Wolf* v. *Colorado,* and in other contemporaneous cases, can be found clear statements of the rule: "[t]hat procuring a search warrant is such a proceeding as may be the foundation of an action for malicious prosecution is not, and cannot be, controverted," *Harlan* v. *Jones,* 16 Ind.App. 398, 45 N.E. 481 (1896); "[a]n action will lie for causing the issuance of a search warrant maliciously, and without probable cause," *Boeger* v. *Langenberg,* 97 Mo. 390, 395, 11 S.W. 223, 224 (1889).[1] *Wolf* also noted that, as of 1949, twenty states allowed some form of statutory sanction against the improper procurement or

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[1] *Accord, Elsee* v. *Smith,* 1 Dowl. & Ry 97 (1822); *Randall* v. *Henry,* 5 Stew. & P. 367, 378 (Ala. 1834); 1 J. Archbold, A Complete Practical Treatise on Criminal Procedure, Pleading, and Evidence 131 (8th ed. 1877).

execution of a search warrant. 338 U.S. at 30, n. 1.

Reference to the tort of malicious prosecution reveals the essential illogic in petitioner's position. To prove a *prima facie* case of malicious prosecution, a plaintiff must prove, among other things, that criminal proceedings were instituted against him. Proof of the issuance of an arrest warrant proves the commencement of criminal proceedings. 1 F. Harper & F. James, The Law of Torts, § 4.3, at 304 (1956); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on The Law of Torts, § 119, at 871 (5th ed. 1984). If the issuance of a warrant satisfies one element of the *prima facie* case, it certainly cannot at the same time provide the malicious prosecution defandant with an absolute immunity to the action.

That the absolute immunity sought by petitioner does not exist under the common law of Rhode Island is shown by *Atkinson* v. *Birmingham,* 44 R.I. 123, 116 A. 205 (1922). The principal defendant in that case was a police officer who had investigated an alleged larceny, reported the facts revealed by his investigation to his superior, and requested that a criminal complaint of larceny be lodged against the plaintiff. The superior filed the complaint and plaintiff was arrested under a warrant issued by the district court. After being acquitted of the criminal charges, plaintiff commenced a malicious prosecution action, which resulted in a directed verdict for defendants on the issue of probable cause. On appeal, the Rhode Island Supreme Court affirmed, finding that, though probable cause was lacking, there was no evidence of malice on the part of the investigating officer. No mention is made in the case of any immunity available to the defendant as a result of the

issuance of the warrant. If such an immunity existed, there would have been no need for the trial court to consider the issue of probable cause or for the appellate court to evaluate the evidence of malice. These issues were reached of necessity because they were the only defenses available. Absolute immunity flowing from the issuance of a warrant was not an issue in the case because it simply did not exist.

Atkinson v. *Birmingham* illustrates the axiom that a plaintiff must prove each element of the *prima facie* case to prevail. With this axiom in mind, petitioner's purported authority for the existence at common law of an absolute immunity can be seen in its proper light. Petitioner's "'main proposition' at common law" (Pet. Br. 19) is acually nothing more than the setttled rule that liability will not follow from the mere presentation of facts to a magistrate.[2] "A distinction must be taken between actually instigating or procuring the institution of criminal proceedings and merely laying information before the law enforcement official without in any way attempting to influence his judgment." 1 F. Harper & F. James, The Law of Torts, § 4.3, at 306 (1956). If a plaintiff cannot prove that the defendant instigated or procured the criminal proceeding then he fails to sustain his burden of proving that it was the defendant, as op-

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[2] Petitioner here did much more than merely present the facts to the district court judge for the judge to decide what action to take. Petitioner concluded in his own mind that respondents had committed the crime of conspiracy to possess marijuana with intent to deliver (J.A. 60), prepared complaints for filing in District Court charging under oath that respondents had committed felonies (J.A. 74, 77), and requested in affidavits the issuance of warrants to arrest respondents (J.A. 73, 76).

posed to the magistrate, who caused the prosecution. Defendant will prevail in this situation, but because of a failure of proof, not because of an absolute immunity.

Brueckner v. *Frederick,* 109 Mo. App. 614, 85 S.W. 775 (1904), quoted by petitioner (Pet. Br. 19), illustrates this distinction. The Court originally reversed a verdict for plaintiff in a malicious prosecution action, ruling that the facts established only that the defendant had placed the facts before a justice of the peace, who had himself made the decision to issue the warrant. On rehearing, however, the Court concluded that defendant's actions were "a sufficient affirmative taking part to place liability on the defendant." *Id.* at 621, 85 S.W. at 777 (opinion on rehearing). The court's discussion shows that the defense was purely a fact-bound issue to be decided upon a review of the evidence, not a principle of absolute immunity which would bar the suit from the outset. The defense is similar to the defenses of probable cause, lack of malice, or advice of counsel available in a malicious prosecution action, all of which rebut the *prima facie* case, are factual only, and must be proven at trial. 1 F. Harper & F. James, The Law of Torts, §§ 4.5, 4.6 (1956); S. Greenleaf, A Treatise on the Law of Evidence, § 457, at 413 (10th ed. 1853); 4 W. Wait, Actions and Defenses, 352-356 (1878).

Thus, the common law provides no support for the absolute immunity petitioner claims under § 1983. To the contrary, actions based on improper conduct in procuring warrants were routinely allowed under the common law. This Court's statement in *Pierson* that police officers were never entitled to an absolute im-

munity under the common law applies with full force to an officer's unlawful procurement of arrest warrants.

B. Qualified Immunity Has Consistently Been Applied To Police Functions Under 42 U.S.C. § 1983.

On many occasions subsequent to *Pierson* v. *Ray*, this Court has repeated its holding there that police officers are entitled only to a qualified immunity. *Scheuer* v. *Rhodes*, 416 U.S. 232, 244-45 (1974) ("When a court evaluates police conduct relating to an arrest its guideline is 'good faith and probable cause.'"); *Imbler* v. *Pachtman, supra*, 424 U.S. at 418; *Procunier* v. *Navarette*, 434 U.S. 555, 561 (1978); *Foley* v. *Connelie*, 435 U.S. 291, 298-299 (1978); *Michigan* v. *DeFillippo*, 443 U.S. 31, 38 (1979); *Briscoe* v. *LaHue*, 460 U.S. 325, 342 (1983). In *Butz* v. *Economou*, 438 U.S. 478 (1978), this Court noted that qualified immunity for federal officials[3] is the rule and that an absolute immunity will apply only in "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of business." *Id.* at 506-507 (footnote omitted). The *Butz* court noted that *Bivens* had left open the immunity question but pointed out that in *Bivens* "we could not have contemplated that immunity would be absolute." The *Butz* court then quoted with approval Mr. Justice Harlan's characterization in *Bivens* of the

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[3] For immunity purposes, this Court has not distinguished between federal officials sued under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and state officials sued under § 1983. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n. 30 (1982).

scope of liability of police officers sued for money damages: ". . . at the very least such a remedy would be available for the most flagrant and patently unjustified sorts of police conduct." *Id.* at 505, citing *Bivens, supra,* 403 U.S. at 411 (Harlan, J., concurring). Thus, this Court has consistently and repeatedly declared that a police officer engaged in police activities is entitled only to a qualified immunity.[4]

The Circuit Courts of Appeals have followed this Court's holding in *Pierson* and consistently held that police officers are entitled only to a qualified immunity from liability for constitutional violations. *Carter* v. *Carlson,* 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom. District of Columbia* v. *Carter,* 409 U.S. 418 (1973); *Ricci* v. *Key Bancshares of Maine, Inc.,* No.'s 85-1052, 85-1309 (1st Cir. July 24, 1985); *Guido* v. *City of Schenectady,* 404 F.2d 728 (2nd Cir. 1968), *cert. denied,* 395 U.S. 962 (1969); *Logan* v. *Shealy,* 660 F.2d 1007 (4th Cir. 1981), *cert. denied,* 455 U.S. 942 (1982); *Turner* v. *Raynes,* 611 F.2d 92 (5th Cir.), *cert. denied,* 449 U.S. 900 (1980); *Hanna* v. *Drobnick,* 514 F.2d 393 (6th Cir. 1975); *Joseph* v. *Rowlen,* 402 F.2d 367 (7th Cir. 1968); *Landrum* v. *Moats,* 576 F.2d 1320 (8th Cir.), *cert. denied,* 439 U.S. 912 (1978); *Beard* v. *Udall,* 648 F.2d 1264 (9th Cir. 1981); *Anderson* v. *Reynolds,* 476 F.2d 665

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[4] *Briscoe* v. *LaHue,* 460 U.S. 325 (1983) is not to the contrary. The immunity found applicable there was based on the defendant police officer's function as a witness, for which the common law immunized him. The benefit of the immunity was neither limited to, nor dependent on, defendant's position as a police officer. Moreover, *Briscoe* recognizes that "[policemen] are subject to § 1983 lawsuits for the performance of their other duties, as to which they have only qualified immunity . . ." *Id.* at 342.

(10th Cir. 1973). Current common law principles also accord with this Court's holding in *Pierson*. Restatement (Second) of Torts § 656, comment d (1977) ("The rule stated in this Section [absolutely immunizing public prosecutors from malicious prosecution actions] does not give immunity to a peace officer who swears out a warrant against another in the mistaken belief that his conduct is such as to make him guilty of the offense charged against him."); Prosser and Keeton on The Law of Torts, *supra*, at 1056.

This overwhelming line of authority cannot be disputed. It represents a recognition of the state of the common law at the time § 1983 was enacted, as well as an awareness that a qualified immunity represents the proper balance between the vindication of important constitutional rights and effective law enforcement. This precedent should be adhered to and this balance approved by rejecting petitioner's claim of absolute immunity.

C. A Police Officer Is Not Entitled To Prosecutorial Immunity For Initiating Unconstitutional Arrests.

In an attempt to ride the coattails of the prosecutorial immunity recognized by this Court in *Imbler* v. *Pachtman, supra,* petitioner argues that his function in swearing out a warrant for respondents' arrest is so similar to the function of a prosecutor in instituting a criminal proceeding that he, too, must be absolutely immunized. (Pet. Br. 21-22). Petitioner's argument here, when taken to its logical conclusion, proves to be too much, and it must fall of its weight. Moreover, neither *Imbler,* the common law, nor policy considerations stemming from the structure of the

criminal process support extending prosecutorial immunity to routine police conduct in making arrests.

Since *Bivens* and *Monroe* v. *Pape,* 365 U.S. 167 (1961), there has been no question that police officers may be held answerable in a civil action for warrantless arrests or searches made without probable cause. But, with respect to the manner in which the criminal process is set in motion against a person suspected of criminal conduct, there is no qualitative difference between a warrantless arrest and an arrest under warrant; both cause the apprehension of the suspect and the commencement of the criminal process. Therefore, if an arrest pursuant to warrant is deemed to be so "intimately associated with the judicial phase of the criminal process," *Imbler, supra,* 424 U.S. at 430, as to entitle a police officer to prosecutorial immunity, then so should an arrest without warrant. Under this reasoning, no person wrongfully arrested would ever have an action under § 1983 to remedy the wrong. Certainly Congress could never have forseen or intended such an evisceration of the Fourth Amendment and this absurd result must be avoided by rejecting petitioner's claim to prosecutorial immunity.

The common law does not tolerate the result petitioner presses. The same section of the Restatement which this Court cited in *Imbler* [5] as manifesting common law recognition of prosecutorial immunity contains a comment which expressly limits the applicability of the section to prosecutors and expressly withholds the immunity from police officers. Restatement (Second) of Torts § 656, Comment d (1977). Rather

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[5] 424 U.S. at 424, n.21.

than a simplistic application of an immunity based on position rather than function, this distinction is a recognition of the functional differences between police officer and prosecutor. Contrary to petitioner's assertion (Pet. Br. 21), a police officer's decision to seek an arrest warrant is not a major decision comparable to a prosecutor's decision to institute a prosecution. Because Rhode Island law requires that all non-capital felonies must be prosecuted by indictment or information,[6] petitioner's filing of district court felony complaints and procuring of arrest warrants did nothing more than bring respondents before the district court for purposes of setting bail. The decision by the prosecution to sign an information or present the case to the grand jury remained and was the only major prosecutorial decision existing at any time where the exercise of prosecutorial discretion was required.[7]

Therefore, while the filing of complaints and the procuring of arrest warrants may be part of the criminal process, they clearly are not "intimately associated with the *judicial phase* of the criminal process," *Imbler,* 424 U.S. at 430 (emphasis added), so as to justify conferring prosecutorial immunity on the police officer responsible for the arrests. These traditional police functions are simply not comparable

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[6] R.I. Gen. Laws § 12-12-1.2.

[7] Given the necessity of an indictment or information and the facts that respondents are reputable citizens with longstanding ties to the community and that their home was not searched when they were arrested (J.A. 65), it is difficult to discern any reasonable basis for arresting respondents prior to submission of the cases to the grand jury.

to the judgments judges, prosecutors, or grand jurors must make and so cannot be deemed to be "quasi-judicial" functions entitling the officer to the absolute immunity available to the participants in the actual judicial process. *See Imbler, supra,* 424 U.S. at 423 n. 20. Since prosecutors are generally not absolutely immune when they instigate unconstitutional arrests,[8] police officers such as petitioner must bear the same responsibility when they commit unreasonable errors while performing the same function.

II. A Qualified Rather Than An Absolute Immunity For Policemen Who Initiate Unconstitutional Arrests Properly Balances The Purposes Underlying § 1983 Against The Need For Effective Law Enforcement.

In situations where a particular function of a state official enjoyed immunity at common law, this Court has also required a consideration of the policies served by the immunity and the effect that such an immunity would have on the purposes of § 1983 before the immunity will be given effect to defeat the § 1983 action. *See City of Newport* v. *Fact Concerts, Inc.,* 453 U.S.

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[8] *Imbler* v. *Pachtman,* 424 U.S. at 441 n.6 (White, J., concurring); *Guerro* v. *Mulhearn,* 498 F.2d 1249, 1256 (1st Cir. 1974); *Marrero* v. *City of Hialeah,* 625 F.2d 499 (5th Cir. 1980), *cert. denied,* 450 U.S. 913 (1981); *cf. Mitchell* v. *Forsyth,* 53 U.S.L.W. 4798 (1985) (Attorney General of United States not acting in prosecutorial capacity when authorizing warrantless wiretap.); *Contra, Lerwill* v. *Joslin,* 712 F.2d 435 (10th Cir. 1983). *Walden* v. *Wishengrad,* 745 F.2d 149 (2nd Cir. 1984), relied upon by petitioner (Pet. Br. 18 n.8), is not on point. The prosecutorial function held subject to immunity there was the request for an arrest warrant to secure plaintiff's presence at a hearing which required her testimony, not the procurement of an arrest warrant based on an accusation of crime.

at 259. In addition to the complete lack of common law support for the immunity claimed by petitioner, this consideration of the policies behind the claimed immunity and the purposes of § 1983 leads inexorably to the conclusion that a qualified immunity properly balances these competing concerns.

The important remedial and deterrent purposes of § 1983 are obvious.

> The central aim of the Civil Rights Act was to provide protection to those persons wronged by the " '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Monroe* v. *Pape,* 365 U.S., at 184, 5 L.Ed. 2d 492, 81 S.Ct. 473 (quoting *United States* v. *Classic,* 313 U.S. 299, 326, 85 L.Ed 1386, 61 S.Ct. 1031 (1941)). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe* v. *Pape, supra,* at 172, 5 L.Ed.2d 492, 81 S.Ct. 473.

Owen v. *City of Independence, supra,* 445 U.S. at 650-51. These purposes, coupled with the prominent position accorded personal liberties in our constitutional scheme, have compelled a general application of qualified immunity only. *Butz* v. *Economou, supra,* 438 U.S. at 508. Even when the official is required to exercise discretion to perform his duties adequately, this Court has recognized "that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits

will not unduly interfere with the exercise of official judgment." *Id.* at 506-07.

This balanced accommodation of the purposes of § 1983 and the official's proper performance of discretionary duties has been applied to police practices. This Court has recognized that the qualified immunity to which police are entitled under *Pierson* "rests on the difficult and delicate judgments these officers must often make." *Foley* v. *Connelie,* 435 U.S. 291, 299 (1978). Implicit in the application to policemen of a qualified immunity only is the recognition that the usual judgments they are required to make are not so difficult or delicate, when balanced against the important constitutional rights police may often violate, that only an absolute immunity will accommodate the police function. As Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit has noted, the common-law refusal to grant an arresting officer an absolute immunity "reflects a long-standing judgment that the threat of damage suits does not significantly impede the effective operation of a police department, when the impediment is weighed against the public interest in a tort remedy for police misconduct." *Carter* v. *Carlson, supra,* 447 F.2d at 368 n. 9. This judgment applies with equal if not greater force to suits brought under § 1983 to vindicate important constitutional rights, and compels the conclusion that a qualified immunity properly balances society's need for diligent law enforcement against the preservation and vindication under § 1983 of the guarantees of the Fourth Amendment.

Moreover, an absolute immunity for police with respect to the function of procuring an arrest by

warrant will have harmful consequences for outweighing any purported benefit to vigorous law enforcement. More importantly, an absolute immunity will eliminate one of the main incentives which force an officer to conduct an investigation thoroughly and insure that criminal charges are grounded on a reasonable estimation of probable cause. If accountability for unreasonable errors is erased once a warrant is signed by a judge, police will be encouraged to take their warrant applications to a judge no matter how flimsy the case may be, in the hope that the judge will sign the warrant. Once the warrant is signed, civil accountability will be wiped out and the officer will only have to be concerned with satisfying the good faith exception to the exclusionary rule. *See United States* v. *Leon,* 104 S.Ct. 3405 (1984). Also, if an officer knows that a magistrate's signature on a warrant will insulate him from a damages suit no matter how unreasonable his conduct, he will be encouraged to seek out those magistrates who are more lenient in their examination of warrant applications, with a resulting dilution of Fourth Amendment protections.

Petitioner attempts to blunt the objection that an absolute immunity unjustifiably negates the remedial purposes of § 1983 by arguing that respondents have other remedies available to them. (Pet. Br. 25-27). This argument lacks logic, displays an insensitivity to the injury suffered by respondents, and demeans § 1983. First, in light of petitioner's argument that his actions were immunized at common law, it is illogical to argue that respondents can seek a remedy through a state tort action.[9] If such an action is avail-

[9] Also, to the extent that state law remedies are available against an officer in respondent's position, immunizing him from liability

able, then there can be no historic common law immunity. Petitioner cannot have it both ways. Moreover, this Court has never limited the scope of § 1983 simply because a constitutional wrong could be remedied by an analogous state tort action. Petitioner's implicit argument that § 1983 should be relegated to a back-seat role in the scheme of enforcement of constitutional rights demeans the high purposes of the statute and must be rejected.

Second, it is an affront to both § 1983 and to respondents to suggest that the wrong they suffered at the hands of petitioner was "remedied" by the grand jury's action in returning no true bill against them. That the grand jury refused to indict respondents is small consolation to them since they never should have been arrested and branded as drug dealers in the first place. To say that the dropping of baseless charges makes the victim whole flies in the face of every tenet of our law. Only a judicial declaration that respondents were arrested based on an erroneous and unreasonable determination of probable cause, coupled with an award of compensatory damages, will give them any meaningful remedy to vindicate their rights and restore their reputations.

Finally, a qualified immunity will not place any intolerable or unreasonable burden on police officers with respect to arrests pursuant to warrant. Police are, or should be, trained in the law,[10] and the concept of probable cause is a familiar one which they must

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only under § 1983 may not appreciably lessen his fear of litigation resulting from his actions.

[10] Assuming that police receive training in the legal principles which bear on the performance of their law-enforcement functions,

apply regularly. Police are held accountable for unreasonable errors in determining probable cause to arrest without a warrant, *Bivens, supra; Monroe* v. *Pape, supra,* and there is no reason why the same accountability should not apply where the unreasonable determination of probable cause is made in a warrant application. Indeed, since a warrant application usually can be prepared in a deliberate way, with time to analyze and weigh the facts and consult with more knowledgeable or experienced officers when necessary, a more accurate and reasonable determination of probable cause can be expected of an officer preparing warrant applications than can be expected of a policeman who is faced with a snap judgment which must be made on the street.

Therefore, it is completely fair to hold an officer in petitioner's position to the standard of reasonableness which governs his fellow officer who arrests without a warrant. The Fourth Amendment is a declaration that police practices must be conducted within the bounds of reason. Section 1983 declares that when those bounds have been exceeded, the officer is answerable for his unreasonable conduct. Petitioner's argument attempts to nullify the fundamental limitations imposed by the Fourth Amendment and should be rejected.

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there is even more reason to expect constitutionally correct action from them than there is to expect school administrators, (*Wood* v. *Strickland,* 420 U.S. 308 (1975)), prison administrators, (*Procunier* v. *Navarette,* 434 U.S. 555 (1978)), high executive officials, (*Scheuer* v. *Rhodes,* 416 U.S. 232 (1974)), or state hospital administrators, (*O'Connor* v. *Donaldson,* 422 U.S. 563 (1975)), all of whom have a qualified immunity only, to be aware of and comply with constitutional mandates.

III. The Qualified Immunity Standard Of Harlow v. Fitzgerald Was Correctly Applied By The Court Of Appeals.

The Court of Appeals held that petitioner was not absolutely immunized from suit by the issuance of the warrants he requested and that liability will follow if "an officer is 'constitutionally negligent' that is, where the officer should have known that the facts recited in the affidavit did not establish probable cause." *Briggs* v. *Malley,* 748 F.2d 715, 721 (1st Cir. 1984). This is a correct application of the qualified immunity standard of *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), which, contrary to petitioner's assertions, does nothing to alter the division of functions between judge and policeman or to require a more accurate determination of probable cause by the police officer than is called for from the judge.

Throughout his brief, petitioner characterizes the conduct at issue here as the submission of "an allegedly insufficient affidavit" to a magistrate.[11] This phrasing mischaracterizes the question presented in this action and evidences a fundamental misunderstanding of the holding below. The Court of Appeals clearly required proof of unreasonable conduct before liability could be imposed and unequivocally stated that liability would not be imposed where an officer

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[11] Pet. Br. 11, 13, 17, 19, 21, 23, 25, 31. Both of the *amicus curiae* briefs submitted in support of petitioner repeat this mischaracterization by stating that the ruling below imposes liability when an officer's determination of probable cause is subsequently found to be wrong. Brief of *amici* States at 4; Brief of *amicus* Americans for Effective Law Enforcement, Inc. at 4. *Amici* ignore the pivotal caveat that liability will not be imposed unless the officer's error is objectively unreasonable.

has made an erroneous but reasonable determination of probable cause. *Briggs* v. *Malley, supra,* 748 F.2d at 719. Under the holding below, liability will be imposed on a policeman only when his decisions and actions are so egregious that it can be said that no reasonable police officer, possessing the same facts, would have made the same decisions or taken the same actions. By repeatedly characterizing the conduct at issue here as the submission of "an allegedly insufficient affidavit" without recognizing that the holding below further requires a finding that no prudent policeman would have concluded that probable cause exists, petitioner is erecting a straw man which he can easily topple. The holding below is much narrower than petitioner admits.

The holding of the Court of Appeals, requiring as it does a finding of unreasonable conduct in addition to a finding of a Fourth Amendment violation, correctly applies the objective reasonableness standard of *Harlow* to the good faith defense pleaded by petitioners. *Harlow* declared that state actors having the benefit of a qualified immunity "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. Applying this principle to a situation where the constitutional standard is clearly established and the question is whether a given set of facts satisfies the standard yields a test of good faith immunity which shields respondent from liability if his erroneous determination of probable cause was nevertheless reasonable. The holding below thus accords with *Harlow* by immunizing respondent unless reasonable police officers, faced with the same

facts, would have known there was no probable cause to believe respondents had committed a crime.

This application of the objective reasonableness standard of *Harlow* to a determination of probable cause by a police officer is not novel. In *United States* v. *Leon,* 104 S. Ct. 3405 (1984), this Court used *Harlow*'s objective reasonableness test to set the contours of a good-faith exception to the exclusionary rule, implying that in situations where the good faith exception to the exclusionary rule applies, the objective reasonableness of the officer's conduct will also insulate him from liability under § 1983. *Id.* at 3456 n. 35 (Stevens, J., dissenting). It follows that objective unreasonableness should likewise subject the officer to liability. *See also Stone* v. *Powell,* 428 U.S. 465, 541 (1976) (White, J., dissenting) ("There is little doubt that as far as civil liability is concerned, the rule [excusing an officer from liability] is the same under federal law where the officer mistakenly but reasonably believes he has probable cause for an arrest."); *Michigan* v. *DeFillippo,* 443 U.S. 31, 37-38 (1979).

Application of the *Harlow* standard to probable cause issues will not affect the use of summary judgment in § 1983 actions. *Harlow* reiterated the admonition of *Butz* that " 'insubstantial' suits against high public officials should not be allowed to proceed to trial" and that " 'firm application of the Federal Rules of Civil Procedure' is fully warranted in such cases." *Harlow, supra,* 457 U.S. at 819 n. 35 (quoting *Butz, supra,* 438 U.S. at 507-08). Application of Rule 56(c) of the Federal Rules of Civil Procedure to the question of whether a reasonable policeman would have found probable cause should be no more difficult than its application to any qualified immunity issue.

There will not often be a dispute as to the facts the officer had before him when he made his determination of probable cause and, as this case illustrates, those facts may often be recorded on police or court documents, thereby eliminating any issues as to the facts on which the officer based his decision. Thus, the Rule 56(c) analysis can proceed in routine fashion and will result in summary judgment for the officer when there are no material facts at issue and the court determines that a reasonable policeman could have concluded that probable cause existed.[12]

Contrary to petitioner's assertions, the *Harlow* standard neither requires a more accurate determination of probable cause by a policeman than is made by the magistrate nor confuses the division of functions between judge and policeman. Nothing in the application of the *Harlow* standard alters the rules established by this Court's construction of the Fourth Amendment regarding when an arrest may be made without a warrant and in what situations warrants are required. Petitioner's argument (Pet. Br. 34-35) that the ruling below will encourage police officers to forego the warrant procedure implies that the commands of the Fourth Amendment are of secondary importance to the police and that some special incentive, such as civil immunity, must be held out to them to induce them to obey the Constitution. This

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[12] *Floyd* v. *Farrell*, 765 F.2d 1 (1st Cir. 1985) illustrates the workability of the *Harlow* standard as applied to a good faith defense in probable cause cases. There the Court of Appeals reversed the denial of summary judgment for the defendant police officer and held that the officer was immune because the facts warranted an objectively reasonable belief that the plaintiff was committing a crime when defendant arrested him.

argument is particularly offensive, coming as it does from a law enforcement officer who has presumably sworn to uphold the Constitution of the United States.

The division of functions between police and magistrates is left undisturbed by the ruling below. No more accurate determination of probable cause is demanded of the officer than of the magistrate. The officer is simply required to act reasonably in deciding whether probable cause exists. Since the objective reasonableness test measures his conclusions and conduct against what a reasonably prudent police officer would have concluded and done, the officer is clearly not held up to the standards of a judge or magistrate. And since a reasonable error by the officer will not subject him to liability, he is not required to be more accurate than a magistrate in determining probable cause. The *Harlow* standard as applied to determinations of probable cause requires of the officer neither more than the Fourth Amendment requires nor less than the citizenry has a right to expect. *Harlow*'s application below was correct and should be affirmed.

Neither can it be said that the mere act of applying to a magistrate for the issuance of a warrant is *per se* objectively reasonable conduct entitling the officer to immunity without regard to the facts on which his action was based. This *per se* rule is illogical and exalts form over substance. In cases such as this it is a complete contradiction to say that a police officer acts reasonably when he files charges and seeks arrest warrants under facts which no reasonable police officer would have concluded established probable cause. The reasonableness of an officer's conduct cannot be measured by so simple a gauge as whether he applied to a magistrate for a warrant, a procedure which the

Constitution requires him to follow in certain circumstances. Rather, it is the substance of the facts he has before him and the reasonableness of his conduct in light of those facts which must be measured. *United States* v. *Leon, supra,* 104 S.Ct. at 3422. The mere act of appearing before a magistrate with a warrant application cannot cleanse the underlying substantive wrong in submitting an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown* v. *Illinois,* 422 U.S. 590, 611 (1975) (Powell, J., concurring in part).

IV. The Judicial Issuance Of The Warrants Petitioner Applied For Does Not Break The Causal Connection Between Petitioner's Actions And The Harm Suffered By Respondents.

In granting petitioner's motion for directed verdict the District Court relied in part on the argument that judicial issuance of a warrant "breaks the causal chain" between the procuring officer's conduct and the arrest itself and insulates the officer from liability. *Rodriguez* v. *Ritchey,* 556 F.2d 1185, 1193 (5th Cir. 1977) (*en banc*), *cert. denied,* 434 U.S. 1047 (1978); *Smith* v. *Gonzalez,* 670 F.2d 522, 526 (5th Cir.), *reh'g en banc denied,* 677 F.2d 113 (5th Cir. 1982), *cert. denied,* 459 U.S. 1005 (1982). This argument was properly rejected by the Court of Appeals because it does not comport with the language of § 1983 regarding causation, is illogical, and is at odds with the common law.[13]

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[13] Despite presenting the chain of causation argument in his Petition for Writ of Certiorari as indicative of a conflict among the Circuits, petitioner has abandoned the argument in his brief on the merits. Because the issue was raised in the petition it will be addressed here.

The first point of reference must be the language of the statute. Section 1983 creates a civil action against any person "who . . . subjects, *or causes to be subjected*" any person to a deprivation of constitutional rights. 42 U.S.C. § 1983 (emphasis added). By adding the language "or causes to be subjected," Congress expressed the clear intention to subject state actors to liability even when they did not subject a person to a deprivation but rather took actions which caused another to subject that person to a deprivation. The clause clearly establishes a much broader standard of causation, a standard which is clearly met when an arrest is made pursuant to a warrant for which a police officer applied.

The chain of causation argument is also flawed in that it reduces to an assertion that when a person intentionally causes a certain result and causes or motivates another to act in order to accomplish his purpose, he will be absolved just because the completion of the act and attainment of the desired result required the action of another. This would be an anamolous result. Certain, petitioner's actions in filing charges against respondents and requesting the judge to sign the warrants were a factual cause of the unlawful arrests, because "but for" his actions, there would have been no arrests. Petitioner did everything within his power to arrest respondents, and his efforts were successful. It defies logic to conclude, simply because a judge's approval of the warrant was needed and obtained, that petitioner did not "cause" respondents' arrests.

Neither does the judicial issuance of the warrant have some purgative effect on petitioner's wrongdoing.

The judge who issued the arrest warrants here violated respondents' constitutional rights just as petitioner did, and "[judicial] immunity does not change the character of the judge's action . . ." *Dennis* v. *Sparks*, 449 U.S. 24, 28 (1980). No proponent of the chain of causation rule has ever explained why an erring police officer should benefit from a judge's failure, through inattention or ignorance, to perform his function adequately. Simply put, the causal chain argument posits that two wrongs make a right, a proposition that has no place in any jurisprudence.

The causal chain argument also has no analogy at common law. Since malicious prosecution actions could be brought to remedy arrests or seizures made pursuant to warrant, it would have been illogical to argue that the judicial issuance of the warrant broke the causal connection between defendant's actions in procuring the arrest or seizure and the unlawful arrest or seizure itself. That the common law permitted such actions is a recognition that a person who procures an unlawful arrest or seizure must bear the responsibility for the consequences of his actions. In *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961), this Court stated that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." The natural consequences of petitioner's actions were the arrests of respondents. Because these actions were objectively unreasonable, § 1983 requires that petitioner be held responsible for his unreasonable errors.

CONCLUSION

No person should be stripped of the constitutional protections afforded by the Fourth Amendment, or deprived of the remedy 42 U.S.C. § 1983 provides to redress violation of those protections, unless there are compelling reasons for insulating the wrongdoer from liability. No such reasons exist with respect to a police officer who irresponsibly and unreasonably accuses persons of a felony and swears out warrants under which they are arrested. Because of petitioner's errors, respondents were awakened from sleep and arrested in their home, held in jail, then publicly accused of being drug dealers, all without any mote of justification or suspicion. The ruling below gives respondents the opportunity to prove to the trier of fact that petitioner's clear Fourth Amendment violations were objectively unreasonable. This ruling is correct and should be affirmed.

Respectfully submitted,

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